APPEAL NO. 990768

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 16, 1999. On the single issue before him, the hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the ninth compensable quarter. The claimant appeals "each and every finding of fact and conclusion of law"; however, he only discusses and focuses the appeal on urging that he is entitled to SIBS since he did not have an ability to work and that the hearing officer is setting a double standard between temporary income benefits (TIBS) and SIBS. These are the matters we address. The respondent (carrier) argues that there is sufficient evidence to support the decision of the hearing officer and asks that it be affirmed.

DECISION

Affirmed.

The case was submitted on documentary evidence, no testimony being offered by either party. The claimant sustained a compensable injury on _____, reached maximum medical improvement on March 30, 1995, and was assessed a 32% impairment rating. During the filing period for the ninth compensable quarter (October 31, 1998, to January 29, 1999), the claimant did not look for any work and asserted that he did not have an ability to work. Medical reports in evidence show that the claimant continues to suffer the effects of his 1993 injuries and that he is not able to perform heavy labor as he did before his injuries. An earlier functional capacity evaluation shows light-duty capability, although other opinions indicate that the claimant is not suitable for gainful employment. The claimant was scheduled for a required medical examination on June 2, 1998, by Dr. S; however, the examination was not performed because of "veiled" threats of a law suit. Dr. S had also been provided with surveillance videos of the claimant, and described the various physical activities of the claimant as shown. Dr. S indicated that the activity he observed during the office visit and on the videos "both appeared to be fluid with good movement and flexibility" and that the claimant appeared to be able to lift a substantial load.

The hearing officer found that the claimant had some ability to work and did not make a good faith effort to look for work commensurate with his ability. Clearly, the claimant did not look for any work at all and if he had some ability to work, then he has not satisfied the requirement that he attempt in good faith to seek or obtain employment commensurate with his ability to work. (Section 408.142(a)(4)). Although it appears that the claimant had apparently been paid TIBS based on disability as supported by his doctor's medical reports reflecting his inability to perform his job at the time of injury or engage in any heavy labor or "gainful employment," and that the claimant did not look for any employment during that time, this does not mean an entitlement to SIBS has been shown. The claimant complains that the hearing officer is "setting a double standard for injured workers working while receiving TIBS and SIBS." This position does not have merit as the requirements are decidedly different. As we indicated in Texas Workers'

Compensation Commission Appeal No. 951832, decided December 15, 1995, the job search requirements to qualify for SIBS are different and more demanding than qualifications for disability and TIBS.

In the case under review, there was a degree of conflict in the evidence as to the claimant's ability to work. The burden is on the claimant to prove no ability to work if he is to rely on that position as meeting the requirement for attempting in good faith to seek or obtain employment commensurate with his ability to work and thus qualifying for SIBS. The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and a finding of no ability to work must be based on medical evidence or "be so obvious as to be irrefutable." Texas Workers' Compensation Commission Appeal No. 950173, decided March 17, 1995. *See also,* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

From our review of the evidence, we cannot conclude that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Accordingly, we affirm the decision and order of the hearing officer.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge